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VERMONT ENVIRONMENTAL BOARD  
10 V.S.A. Chapter 151

RE: Chester P. and Bertha B. Denio by John D. Hansen, Esq. P.O. Box 727 Rutland, VT 05701	Findings of Fact, Conclusions of Law, and Order Application #1B0036-2-EB
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I. SUMMARY OF PROCEEDINGS

This decision pertains to an appeal filed with the Environmental Board on September 21, 1987 by Chester P. and Bertha B. Denio (the Applicants) from the August 27, 1987 decision of the District #8 Environmental Commission denying the Applicants' request to amend Land Use Permit #1B0036 (the permit) to allow subdivision of three lots adjacent to the previously-approved 71-lot subdivision off Route 7A in Shaftsbury, Vermont. The Applicants have appealed the District Commission's decision that the proposed subdivision did not meet Criteria 8 (aesthetics and scenic beauty) and 9(B) (primary agricultural soils).

The Board opened the preliminary hearing in this matter on October 20, 1987 in Manchester, at which no appearances were entered. On October 29, 1987, the Board held a pre-hearing conference in Shaftsbury, attended by attorney John D. Hansen on behalf of the Applicants. At the prehearing conference, the Applicants raised several legal arguments which, if agreed to by the Board, would have obviated the requirement for public hearing. The Applicants agreed to submit a brief on these arguments by November 13, 1987. Procedures concerning a public hearing were set in the event a hearing was deemed necessary.

The Applicants did not submit a brief by November 13, 1987, but on May 9, 1988 requested a public hearing on the appeal. The Board issued a notice of public hearing on July 28, 1988. The Applicants submitted prefiled testimony and exhibits on August 19, 1988. On August 23, 1988, an administrative hearing panel of the Board convened a public hearing in this matter, pursuant to Board Rule 41, Chairman Leonard U. Wilson presiding. Attorney Hansen appeared on behalf of the Applicants. At the hearing, a report was admitted into evidence from the Soil Conservation Service (SCS) concerning the presence of primary agricultural soils at the Site which the Applicants propose to develop. The Applicants objected to the admission of this report. After taking testimony, the panel recessed the hearing pending review of the record and the preparation of a proposed decision. Immediately following the hearing, the panel conducted a site visit.

A proposed decision was sent to the parties on February 10, 1989, and the parties were provided an opportunity to file written objections and proposed findings of fact and conclusions of law, and to present oral argument before the full Board. On March 1, 1989, the Applicants submitted written objections to the proposed decision. The Board deliberated concerning this matter on March 8, 1989. On that date, following a review of the proposed decision and the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. The following findings of fact and conclusions of law are based exclusively on the record developed at the hearing.

## II. ISSUES IN THE APPEAL

1. Whether the SCS report is admissible before the Board.
2. Whether the proposed subdivision would have an undue adverse effect on the scenic and natural beauty or aesthetics of the area under Criterion 8.
3. Whether the soils at the proposed subdivision are primary agricultural soils as defined in 10 V.S.A. § 6001(15); if so, whether the proposed subdivision would significantly reduce the agricultural potential of primary agricultural soils under Criterion 9(B) (primary agricultural soils); and if so, whether the project satisfies the four subcriteria of Criterion 9(B).

## III. FINDINGS OF FACT

1. The District #1 Environmental Commission issued Land Use Permit #1B0036 on March 22, 1972. This permit authorized the Applicants to construct a 71-lot subdivision of single-family residential dwellings in the Town of Shaftsbury, Vermont. This subdivision was constructed and is known as "Hidden Valley."

On July 15, 1975, the District Commission granted a request by the Applicants to amend the permit. On April 19, 1977 the District #8 Environmental Commission granted an additional request by the Applicants to amend the permit and issued permit amendment #1B0036-1.

In addition to single family dwellings, the Hidden Valley subdivision contains common land for use by, and

benefit of, the development and its residents, and a "greenbelt" along the subdivision's southern and eastern sides. The Applicants intend to maintain the common land and greenbelt in their current condition. The purpose of the greenbelt is to set the residential dwellings of the subdivision back from a railroad which runs along the subdivision's eastern side. The greenbelt contains vegetation which screens the residential dwellings from the railroad.

4. The Applicants have proposed to subdivide for purposes of building single-family residential dwellings on an additional seven-acre parcel adjacent to the Hidden Valley subdivision on the subdivision's northwest side (the Site). The Site is presently undeveloped and not in use. The Applicants propose to subdivide the Site as follows: 3.15 acres on the west as Lot "81," 2.3 acres in the middle as Lot "82," and 2.0 acres on the east as Lot "83."
5. As observed by the panel at the site visit, the Hidden Valley subdivision is located in an area with a hodge-podge of surrounding land uses: residential single-family dwellings, agricultural, open space, and tourist-oriented commercial. This situation appears to be the result of intrusion of residential and commercial on rural, agricultural land. The open space and agricultural uses appear to mitigate the effects of residential and commercial growth.
6. The Site's terrain is hilly. The Site's highest point is on the west side of Lot #81. This lot slopes downward easterly into Lot #82. The grade of this slope is approximately 12%. Continuing east, the terrain slopes up again slightly before descending into Lot #83. The land begins to rise once more at the northeastern side of Lot #83. In addition, there is a small hill in the south center of the Site in Lot #82. The Site is mostly meadowland, with trees along its southwest side. The meadow character of the Site makes a positive aesthetic contribution to the area by counterbalancing open space with the residential character of the existing Hidden Valley subdivision. This open space would be eliminated by the proposed subdivision.
7. The entrance road to the Hidden Valley subdivision is along the Site's southwest side to Route 7A, crossing a brook before it meets 7A. A person entering the subdivision by automobile will cross this brook.

8. Directly across the entrance road from the Site is a parcel (the barn parcel) running west along the south side of the road to Route 7A, from which the barn parcel is visible. This parcel is meadowland, and contains an old barn the color of natural wood. The Applicants have renovated and restored this barn to provide an aesthetic benefit to those entering the subdivision or driving by the entrance along 7A, and intend to maintain the barn and barn parcel in their current condition.
9. South of the barn parcel, on the other side of a row of sugar maple trees, is a parcel, the southern end of which is currently used by the Applicants for cultivation of Christmas trees (the Christmas tree parcel). This parcel also borders, and is visible from, Route 7A. The Applicants plan to continue cultivation of Christmas trees on this parcel and to expand this cultivation to the entire parcel. The parcel borders 7A on part of its western side.
10. To the north and west, the Site borders on two lots presently owned by the family of Sanford Buxbaum (the Buxbaum Lands). The western lot is called the "Homestead Lot." Its western border is Route 7A, from which it is visible, and part of its southern border is the entrance road, running west back to 7A. The Buxbaum Lands are used solely for residential purposes. The Site presently provides a positive aesthetic benefit to the residents of the Buxbaum lands by giving them a view of an open meadow.
11. A hill rises from the southeastern side of the Buxbaum Lands into Lot #81. This hill partially screens the Site from Route 7A.
12. East and northeast of the Site lies a five-acre parcel used for residential purposes which has been partially reforested by the occupant. The Site is separated from this parcel by a line of trees. On most of the Site's eastern border, this parcel is a narrow driveway. East of the driveway is Hidden Valley subdivision Lot #43.
13. South of the Site is a secondary subdivision road, which runs west to intersect with the entrance road. Beyond this road are Hidden Valley subdivision Lots #44 and 45, which lead to the rest of the existing subdivision.

14. On Lot #81, the Applicants propose to build a three-bedroom house on the hill that screens the Site from Route 7A and the Buxbaum lands, just east of the peak of the hill, **as** the slope descends into Lot #81. The hill will partially screen the house from Route 7A. The house will be approximately 165 feet in from the entrance road. This measurement (and all **subsequently-**mentioned measurements of the distance between proposed lot improvements and roads) is based on Exhibit #2 submitted to the Board and is reached by measuring in a straight line to the edge of the travelled way from the closest part of the improvement and multiplying by the scale marked on the exhibit. On the same side of the hill as the house, the Applicants also propose to build a driveway going south to the entrance road, a septic tank, and a well north of the house.
15. On Lot #82, the Applicants propose to build a three-bedroom house set back approximately 320 feet from the entrance road. A driveway is proposed to connect with the subsidiary subdivision road mentioned above, running parallel to the entrance road at a distance ranging from approximately 100 to 180 feet. The elevation on which the house will be built is approximately 15 to 20 feet lower than the peak of the hill screening the Site from Route 7A. This measurement is based on the contours given in Exhibit #2. The house will be partially screened from Route 7A by this hill. A septic tank and a well are also proposed for Lot 82, on the far side of the driveway from the entrance road.
16. On Lot #83, the Applicants propose a three-bedroom house set back approximately 270 feet from the secondary subdivision road. Based on the contours in Exhibit #2, the elevation on which the house will be built is approximately 20 to 25 feet lower than the peak of the hill which screens the Site from Route 7A. The house will be partially screened from 7A by this hill. The driveway proposed for this lot is set back from the road nearly as far as the house, and would connect with the driveway used by the occupant of the parcel referred to in Finding 11, which leads to the secondary subdivision road. Lot #83 would also include a septic tank and a well near the house.
17. Currently travelers along Route 7A can see the area of the Hidden Valley subdivision. As evidenced at the site visit and in the record, these viewers can see some of the existing subdivision's houses. However, these houses are partly hidden by trees and topography, and the view from the road is partially mitigated by

the Site and barn parcel, which provide sight of open space. Development of the Site will mean loss of open space view. In addition, the houses proposed for the Site will be more visible to road travelers than those of the existing subdivision because they will be closer to Route 7A.

18. The soil at the Site ranges from coarse gravel to sand. A small abandoned gravel pit exists at the Site, located near one of its borders. At the site visit, the gravel pit was indicated as on the northeast side of the parcel. The Site has been used as a hayfield by the Applicants. Because of the soils at the Site, the Applicants have been unable to grow hay well on most of the parcel, except for one acre into which the rest of the Site drains.
19. The operating farm nearest the Site is called the Jersey farm. This is the only working farm in the area of the proposed project. It is operated by Alan Lawrence and is one and one-half miles from the Site to the south.
20. Lands between the Jersey farm and the Site are available for agricultural use by the Jersey farm.
21. The Applicants intend that traffic accesses to the proposed lots conform to the Vermont Agency of Transportation standards.
22. The Applicants intend that building styles and landscaping for the proposed subdivision will resemble that of the existing Hidden Valley subdivision.
23. The Applicants intend to insulate all buildings in the proposed subdivision according to the following factors: R-19 in the walls, R-38 in ceilings, and R-10 in foundations, with triple-glazed windows. They intend that electric heat be prohibited.
24. Findings 21 through 23 are based on the Applicants' initial application to the District Commission for permit amendment #1B0036-2.

#### IV. CONCLUSIONS OF LAW

##### A. Admissibility of the SCS Report

The Applicants object to the admission of the SCS report. Upon review, the Board rules that this report is

inadmissible hearsay because its author was not present at the hearing to authenticate the document and be available for cross-examination.

B. Criterion 8 (Aesthetics and Scenic Beauty)

Act 250 does not permit issuance of a land use permit if the Board or district commission finds that a proposed project will have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas. 10 V.S.A. § 6086(a) (8).

In Re: Quechee Lakes Corporation, Land Use Permits #3W0411-EB and 3W0439-EB (November 4, 1985), the Board detailed a two-step process for analysis pursuant to Criterion 8. First, the Board determines whether there is an "adverse" effect on the values described in this criterion. To do so, the Board examines whether a proposed project will be in harmony with its surroundings, considering several factors, including the project's impact on open space and visibility.

Second, the Board determines whether an adverse effect is "undue." The Board considers a project's effect undue if the Board reaches a positive conclusion with regard to any one of three factors: (a) whether the project would violate a clear, written community standard intended to preserve the aesthetics or natural, scenic beauty of the area; (b) whether the project would be shocking or offensive to the average person; and (c) whether the applicant has failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings.

1. "Adverse"

The Board concludes that the proposed subdivision's effect on scenic beauty and aesthetics would be adverse. The area in which the proposed subdivision would be located currently has a variety of uses: residential, agricultural, open space and tourist commercial. It appears that this situation occurred due to the intrusion of residential and commercial uses into an area once primarily agricultural. Aesthetically, the open space and agricultural uses mitigate the effect of the residential and commercial intrusion. The Board bases this conclusion on the panel's observations at the site visit.

The proposed subdivision would destroy the open space character of the Site and thereby remove its mitigating value. Houses, driveways and wells would be placed on the

Site, and these installations would have a deleterious effect on open space no matter how designed. Further, the Applicants do not propose to cluster the proposed dwellings but rather to construct them on individual multi-acre lots. Thus, any potential mitigating effect of cluster planning is not present. In this regard, the Board recognizes the Applicants' contention that the Town of Shaftsbury zoning ordinance may not allow cluster planning, but rules that it is not bound by this ordinance.

The effect on aesthetics and scenic beauty would be adverse also because the new dwellings will be partially visible from Route 7A. Although persons driving by on 7A currently see portions of the Hidden Valley subdivision, the existing subdivision dwellings are further back from 7A than the Site, and currently the undeveloped nature of the Site mitigates the effect of the existing subdivision by presenting the viewer with a natural area not interrupted by residences. In addition, the proposed dwellings at the Site would adversely affect the views of residents of the Buxbaum lands, who currently see an undeveloped meadow.

The Board notes and disagrees with the arguments raised by the Applicants in their objections to the Board's conclusion that the proposed subdivision would have an adverse effect on aesthetics and scenic beauty. For example, the Applicant asserts that the burden of proof with respect to Criterion 8 is on the opponents of a project, that no parties have opposed the proposed subdivision in the Board's proceedings, and that therefore the Board cannot conclude that the subdivision would have an adverse effect. 10 V.S.A. § 6088(b). However, the Board is not permitted to issue a land use permit without making a positive finding with regard to all Act 250 criteria. 10 V.S.A. § 6086(a). Thus the Board has previously concluded that an applicant must provide sufficient evidence for the Board to make a positive finding even if the burden of proof on a criterion rests with the opponent. Re: Pratt's Propane, Application #3R0486-EB at 5 (January 27, 1987). It is a necessary corollary to this rule that should the evidence presented suggest a negative finding to the Board, the Board must make such a finding. In this case, the Board has reached a negative finding on adverse effect based on the evidence submitted and the site visit.

Further, the Applicants appear to object to the standards which the Board has applied in determining whether their proposed subdivision is adverse. Their objection seems predicated on the alleged use of "subjective" rather than "objective" standards. This appears to be an attack on the legality of the standards the Board uses in evaluating



projects pursuant to Criterion 8, but the Board cannot discern from the Applicants' filing the legal basis for their argument. The Board previously upheld the validity of the Quechee analysis in Pratt's Propane. The Board sees, and has been offered, no reason to change its position.

2. "Undue"

The Board determines that the proposed subdivision's adverse effect on scenic beauty would not be "undue" because the Board does not reach a positive conclusion with respect to any of the remaining three factors set forth in the Quechee decision. There is no evidence in the record that the subdivision would violate clear, written community standards or be shocking or offensive to the average person.

Further, the Applicants have taken mitigating steps with regard to the subdivision's effect on scenic beauty. The Applicants have mitigated the visual impact by siting the proposed residential homes such that they are partially screened by a hill from Route 7A, and by committing to maintain the barn parcel in its present condition and to use the Christmas tree parcel for growing Christmas trees. By committing the barn parcel to its current condition, the Applicants have also mitigated the loss of open space. The Board believes that further mitigation measures are not necessary in this case because the Applicants have already set aside the greenbelt and common land. Since these mitigation measures are an integral part of the Board's conclusion that the subdivision's adverse effect is undue, the Board will ensure these measures are taken by imposing appropriate permit conditions.

The Applicants object to the panel's proposed permit conditions with respect to the above mitigation measures and to the restrictiveness of the uses allowed. However, the Applicants themselves used these items to advance their case before the Board and requested that the Board rely on them in issuing approval.

Nonetheless, in its final decision the Board will meet some of the Applicants' concerns. Specifically, the proposed decision would have required the Permittees to maintain the barn parcel, greenbelt and common land in their current conditions, and to grow Christmas trees on the Christmas tree parcel. In response to the Applicants' objections, the Board will now instead allow use of the barn parcel consistent with maintaining its open space character, use of the greenbelt and common land as open space or for forestry or agricultural purposes, and use of the Christmas tree parcel for forestry or agricultural purposes. The Board determines

that these uses will still allow for the mitigation necessary of the proposed subdivision's adverse effect on scenic beauty. With respect to the barn parcel and greenbelt, the Board concludes that it is extremely important in mitigating the subdivision's effect to maintain them as, respectively, open space and land providing a vegetative screen to the subdivision. The Board will therefore require amendments to this permit to ensure consistency with permitted uses before any implementation of any change in these parcels from their current conditions. In contrast, the Applicants will not be required to seek amendments to this permit for changes in use of the common land and Christmas tree parcels unless these changes portend a change in use other than those allowed in the permit.

C. Criterion 9(B) (Primary Agricultural Soils)

Act 250 does not permit the Board or a district commission to issue a land use permit for a project if the project will significantly reduce the agricultural potential of the primary agricultural soils. 10 V.S.A. § 6086(a) (9) (B).

"Primary agricultural soils" are defined at 10 V.S.A.

§ 6001(15) as:

soils which have a potential for growing food and forage crops, are sufficiently well drained to allow sowing and harvesting with mechanized equipment, are well supplied with plant nutrients or highly responsive to the use of fertilizer, and have few limitations for cultivation or limitations which may be easily overcome. In order to qualify as primary agricultural soils, the average slope of the land containing such soils does not exceed 15 percent, and such land is of a size capable of supporting or contributing to an economic agricultural operation.

10 V.S.A. § 6001(15).

This definition does not apply to the soils at the Site. The definition requires that land containing purported primary agricultural soil must be "of a size capable of supporting or contributing to an economic operation." Although even quite small parcels of land can and do contribute to an economic agricultural operation, such contribution depends on a number of factors, including proximity

of roads, particular soil type, and the nature of a farmer's operation. In this case, the Board concludes that it is highly unlikely that agricultural use will ever be made of this 7-acre parcel of land. The Board bases this conclusion on a combination of factors: (a) its small size; (b) the historical difficulty in farming all but one acre at the Site; (c) absence of an operating farm in close proximity to the Site; and (d) the availability to this operating farm of potential farmland less distant than the Site.

Accordingly, the Board determines that the soils at the Site are not "primary agricultural soils," and therefore that the proposed project will not significantly reduce the agricultural potential of the primary agricultural soils. Having reached this conclusion, the Board finds it unnecessary to address whether the four subcriteria under Criterion 9(B) are met.

Based on the foregoing findings of fact and conclusions of law, the Board concludes that the project described in Land Use Permit Amendment Application #1B0036-2, if completed and maintained in accordance with all the terms and conditions of this application, the exhibits presented to the Board and District Commission by the Applicants, and the conditions set forth in Land Use Permit Amendment #1B0036-2-EB as issued herein, will not cause or result in a detriment to the public health, safety or general welfare under the criteria set forth in 10 V.S.A. § 6086(a).

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VI. ORDER

Land Use Permit Amendment #1B0036-2-EB is hereby issued in accordance with the findings of fact and conclusions of law herein. Jurisdiction over this matter is returned to the District #8 Environmental Commission.

Dated at Montpelier, Vermont this 27th day of March, 1989.

ENVIRONMENTAL BOARD

By:

Leonard U. Wilson  
Leonard U. Wilson, Chairman  
Ferdinand Bongartz  
Samuel Lloyd  
Lawrence H. Bruce, Jr.  
Roger N. Miller  
Arthur Gibb  
Jan S. Eastman

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